

appears to have been more a product of carelessness than evasiveness.

SO, the "Motion to Enlarge Issues Against Davis" that Ohio Radio Associates filed on September 15, 1993, IS DENIED.

Memorandum Opinion and Order, FCC 93M-614 (Sept. 14, 1993). The same conclusion should be reached by the Presiding Judge during his consideration of ORA's and Ringer's proposed conclusions.

***Business Knowledge***

28. ORA implies also that Davis is not entitled to quantitative integration credit because of her lack of present knowledge about the radio industry. ORA's proposed findings and conclusions contain a host of inaccuracies and irrelevancies. For example, ORA claims that "Davis does not actually know how much it would cost to operate a station." ORA Conclusion ¶ 84. There is no testimony to that effect, and in any event, the Commission repeatedly has stated that "lack of broadcast experience is not relevant to the quantitative integration analysis." The Baltimore Radio show, 4 FCC Rcd 6437, 6438 ¶ 7 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 3712 (1990). ORA also claims "Davis has never done a market analysis as to a format for her proposed station." ORA Finding ¶ 13. ORA does not explain, however, what relevance that fact has under the Standard Comparative Issue, or of what relevance a format decision today would have for a station which may not begin operating for two years (during which time the formats can freely change). ORA also claims that Davis does not "know anything about the economic state of radio in general." ORA Finding ¶ 48. Ms. Davis testified, however, on the very pages to

which ORA refers that she is fully aware of the uncertain nature of the radio business. TR 381-82. ORA notes that as Davis testified, she does not know the specific profitability of FM radio stations in the Columbus area or the specific radio revenues for the local market. ORA Finding ¶ 48. Putting aside the question of whether such information even is available,<sup>11</sup> what ORA fails to note, however, is that Davis is already fully-entrenched in the Columbus business community. As ORA (as well as all other applicants) conveniently fail to include in their proposed findings, Davis is well established and has been successful in the past in the Westerville-area business community.<sup>12</sup> Thus, the record reflects Davis is fully familiar with the current state of the Columbus business community even without developing specialized studies of "revenue projections" or overall advertising revenues for the Columbus market. With the possible exception of ASF's Ms. Frizzell, Ms.

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<sup>11</sup> For example, as WII's principal testified, WBBY's General Manager did not feel free to reveal Station WBBY's revenues to the public. TR 296. Moreover, the FCC stopped requiring stations to file Annual Financial Reports (FCC Form 324) with the government in 1982. Annual Financial Report of Broadcast Stations, 51 R.R.2d 135 (1982), recon. denied, 52 R.R.2d 792 (1982).

<sup>12</sup> Ms. Davis was a 1991 "Columbus Chamber of Commerce Small Business Person of the Year" Finalist, which is an award given to small business owners who exemplify high business standards and extensive community involvement (Davis Exh. 1 at 4 and Atts. E & F); 1991 Department of Commerce Minority Business Development Council "Regional Retailer of the Year," which is an award given for business excellence in retail trade (Davis Exh. 1 at 4 and Att. G); 1991 Winner of the Ernest & Young, Merrill Lynch & Co., Inc. Magazine "Entrepreneur of the Year" Award in the category of "Emerging Entrepreneur," which is an award given to area business people who have excelled in business and community involvement (Davis Exh. 1 at 5 and Att. J); and 1990 Columbus Chamber of Commerce "Minority Business of the Year" award winner (Davis Exh. 1 at 5 and Att. L), which is an award given for business achievements recognized by local businesses and corporations. See Davis Finding ¶ 33.

Davis singularly is the only applicant with a hands-on knowledge of the businesses and the economy comprising the Westerville-Columbus market.<sup>13</sup>

29. ORA also claims that since deciding to apply in December 1991, Ms. Davis "has done very little to learn about the radio industry," claiming that all she has done was to read a book published by the National Association of Broadcasting and to tour WBBY-FM facilities. ORA Finding ¶ 49. ORA again fails to accurately recite the facts contained in the record. As the record shows, she has been consulting with Ms. Scheimer, who was a former employee of WBBY-FM, she has toured and consulted with station personnel at another area Ohio radio station, WROU(FM),<sup>14</sup>

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<sup>13</sup> It is worth noting that the record also is devoid of any evidence that any other applicant has "done a market analysis as to a format" for the station, "research as to [the station's] potential profitability," "revenue projections," "the overall radio advertising revenues for the local market," "the profitability of FM radio stations in the Columbus market" or "the economic state of radio in general." Cf. ORA Findings ¶ 48. What ORA does not seem to realize is that it is not the role of the Commission to regulate the planning or operation of radio facilities. As the Commission repeatedly has noted:

[t]he Commission...is not the guarantor of the financial success of its licensees. That is a judgement to be made by the applicants and the marketplace. As we stated in Triangle Publications, Inc.:

we are not generally concerned with the competitive status of licensees and are not insurers of lucrative operations.....[A licensee's] private objective, then, is of little weight in the determination of the ultimate public interest.

Triangle Publications, Inc., 29 F.C.C. 315, 318 (1960), affirmed sub nom., Triangle Publications, Inc. v. FCC, 291 F.2d 342 (1961).

<sup>14</sup> Station WROU is licensed to West Carrollton, Ohio.

and has toured their facilities. TR 417. This is in addition to her day-to-day attempts to familiarize herself to the current broadcasting efforts of the existing Columbus-area stations. TR 412.

30. Finally, ORA makes the claim that "Davis does not know if she will have a salary at the proposed Westerville station" (ORA Finding ¶ 48), implying that she is ignorant of her own proposal. What her testimony actually states is that she "hopes [to have a salary], but there's a possibility that she may not" (TR 387) and that she has budgeted a salary for herself of \$30,000. TR 388.

31. In short, nothing in ORA's inaccurate findings in any way detract from Davis' ability to fulfill her pledge to work full-time at her proposed facility. Thus, the Presiding Judge should reject ORA's misguided findings and conclusions in this regard, as well.

#### *Deference to Counsel*

32. ORA also claims that because Davis "dutifully followed counsel's directives" that she is entitled to no quantitative integration credit, citing, apparently,<sup>15</sup> the Review Board decision issued in Atlantic City Community Broadcasting, Inc., 6 FCC Rcd 925, 932 ¶¶ 22 (1993). In so doing, ORA misstates the law. In the more recent Commission decision in Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993), the Commission stated:

We clarify that [a principal's] deference to her attorney is not probative of her capacity to effectuate her integration proposal.

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<sup>15</sup> ORA does not provide a citation for the Atlantic City case. See ORA Conclusion ¶ 86.

To the extent the Board (Decision ¶ ¶ 20, 22) suggests otherwise, it is expressly overruled.

*Id.* at 4523 n.15. This proposed conclusion should also therefore be rejected as well.

***Real-Party-in-Interest***

33. ASF also claims that "there is a strong likelihood that [Ms. Davis] may be fronting" for her husband or her brother-in-law in applying for this frequency. ORA Conclusion ¶ 67. Similarly, ORA attaches significance to the fact that Ms. Davis' husband advised Ms. Davis to follow her FCC counsel's advice. ORA Finding ¶ 47.

34. ASF supplies no evidence to support its outrageous charge, nor does such evidence exist. The record reflects that Ms. Davis learned of the availability of the Westerville frequency on her own. TR 403. Her husband, Reginald Davis, chose not to seriously consider applying for the frequency based upon his experiences in two prior applications. TR 403-04. Ms. Davis was referred to her FCC counsel not by her husband, but from her brother-in-law, Benjamin Davis. TR 404. She independently developed cost estimates for the non-technical items of her budget. TR 406. As to ORA's charge, the record shows that Mr. Davis' suggestion to follow advice of legal counsel came about after Ms. Davis questioned her husband concerning procedures to follow -- Mr. Reginald Davis specifically declined to become involved in her application, and advised Ms. Davis to consult with legal counsel. TR 407.

35. Thus, there is no "real-party-in-interest" at issue in this proceeding. Absent the prior designation of a real-party-in-interest issue, it is improper to even

consider denying integration credit to Davis. Religious Broadcasting Network, 3 FCC Rcd 4085, 4089, ¶ 11 (Rev. Bd. 1988), recon. granted in part, 3 FCC Rcd 6216 (Rev. Bd. 1988); Tequesta Television, Inc., 2 FCC Rcd 7324, 7325, ¶¶ 5-6 (Rev. Bd. 1987). Accord Mabelton Broadcasting Co., 68 R.R.2d 750, 763-64, ¶¶ 37-40 (Rev. Bd. 1990).<sup>16</sup> Under Commission precedent, even where an applicant's supportive spouse is marginally involved in assisting an integrated principal, credit is not reduced where there is no planned involvement of the spouse at the proposed station. Oliver Kelley & Mary Ann Kelley, 6 FCC Rcd 7377, 7379 ¶¶ 13-14 (Rev. Bd. 1991). The test for a real-party-in-interest is whether the undisclosed person owns or will be in an actual position to own or control the station. A.P. Walter, Jr., 6 FCC Rcd 875, 878-79 ¶ 20 (Rev. Bd. 1991). Such an issue is not raised simply because one spouse assists the other. Id. In this case, where no assistance has been rendered and no evidence has been offered indicating that any past or future planned involvement on the part of either Reginald or Benjamin Davis in the planned operations of the station, the parties' speculative assertions must be rejected.

#### **Qualitative Enhancements**

36. All of the competing applicants' proposed findings and conclusions fail to acknowledge that Davis is a past local Westerville resident who also has lived directly

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<sup>16</sup> As the Review Board noted in Mabelton, supra., among the immutable prerequisites to full and fair adjudication is the right to adequate notice and the right to be heard (id. at 763, ¶ 38) (two privileges not yet provided under the parties' "phantom" real-party-in-interest-issue), and as the Review Board stated in Religious Broadcasting Network "[w]ithout such an issue, or the adduction of evidence compelling the addition [of] such an issue," it would not reduce an applicant's integration credit. Religious Broadcasting Co., 3 FCC Rcd at 4089, ¶ 11.

adjacent to Westerville. It is well established that local residency is a factor of fundamental consideration in the licensing scheme. Radio Jonesboro, Inc., 100 F.C.C.2d 941, 944 (1985). Residency in the community to be served is of "primary importance." Policy Statement, 1 F.C.C.2d at 396. Moreover, residency in the area adjacent to the community of license is equal in importance to residence within the proposed community of license. Ronald Sorenson, 6 FCC Rcd 1952, 1954 n.2 (1991), recon. dismissed, 6 FCC Rcd 6901 (1991). Thus, Davis is entitled to "local" credit for her residency in or adjacent to Westerville for the last eight years, since 1986. Additionally, Davis resided within simply the service area of the proposed station for an additional two year period (from 1984-85). Davis Finding ¶ 34. The credit due for service area residency "closely follows" the credit due for local residency. Policy Statement, 1 F.C.C.2d at 396. Thus, in all, Davis is entitled to substantial credit for her total nine year local and service area residencies.

37. All of the competing applicants' proposed findings and conclusions also fail to contain a complete listing and analysis of her past civic involvement. As the record reflects, Davis has engaged in a wide, diverse, ongoing series of local and local-area civic activities (Davis Finding ¶ 35) for which credit is warranted. The activities have involved fundraising activities for charitable organizations,<sup>17</sup> and participation in organizations that provide assistance to young adults,<sup>18</sup> other minority

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<sup>17</sup> Ms. Davis was a Red Cross Neighborhood Volunteer in 1990. Davis Finding ¶ 35.

<sup>18</sup> She has belonged to a national women's civic organization called The Columbus Chapter of Links, Inc. for the past four years. Davis Finding ¶ 35. In 1990 the organization's Project Lead program enabled her to work closely with sixth and seventh

group members,<sup>19</sup> the elderly,<sup>20</sup> the speech and hearing impaired,<sup>21</sup> and women.<sup>22</sup>

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graders to help improve their self-esteem and offer alternatives to promote a more positive life-style. Id.

Additionally, from 1990 through 1992 she was involved in mentoring with two established programs. She also was assigned to two young women for one hour or more per month through the Columbus Minority Business Center. Davis Finding ¶ 35. Through a pilot program of the U.S. Small Business Association called the "Women's Network for Entrepreneurial Training," she is assigned a protege on a scheduled basis. Davis Finding ¶ 35.

Ms. Davis also has been involved in two efforts to provide young adults with business experience. In 1988 Ms. Davis instituted a project through her business where she keeps on-staff a student from one of the Columbus high school career centers who is studying business, which continued through 1992. Davis Finding ¶ 35. Ms. Davis was a Columbus Chamber of Commerce Project Future Mentor in 1991 in which she employed a high school student for six weeks to provide real-life work experience. Davis Finding ¶ 35.

Finally, in 1991 Ms. Davis was a Linden-McKinley High School Presenter, where she was a speaker to high school students about careers in future technologies. Davis Finding ¶ 35.

<sup>19</sup> She participated in a United Way program called Project Diversity from 1990 to 1991, focusing on the preparation of minority men and women to serve as board members. Davis Finding ¶ 35. She continued her involvement with the program by serving on the Advisory Committee to plan future Project Diversity programs. Davis Finding ¶ 35.

Ms. Davis participated in fundraising efforts for the King Center Annual Campaign Chair for Black Owned Businesses in 1991-92. Davis Finding ¶ 35. This organization solicited financial support for the King Center, which is a multi-cultural center that focuses on programs for children.

Ms. Davis was a Member of the United Way Business Development Committee in 1991, in which capacity she solicited donations from other minority businesses. Davis Finding ¶ 35.

Ms. Davis has been on the Columbus Regional Minority Supplier Development Council's Input Committee from 1990-present, in which she participates in formation of the organization's programs. Davis Finding ¶ 35.

<sup>20</sup> Ms. Davis has been a member of the New Salem Baptist Church Business Development Board from 1991 to 1993. Davis Finding ¶ 35. The New Salem Baptist Church Business Development Board directs the business activities of the New Salem Baptist Church. Id. In that activity, Ms. Davis was instrumental in overseeing the construction



She has been in leadership positions in a number of those activities.<sup>23</sup> Finally her involvement in civic activities in the area has been ongoing, since 1988, long before her application in this proceeding was filed. Consequently, Davis is entitled to a substantial enhancement under this factor. Rebecca L. Boedker, 6 FCC Rcd 2557, 2559 ¶ 14 (1991) (applicant whose record of civic activities is "manifestly . . . extensive" is entitled to substantial enhancement credit); Ronald Sorenson, 6 FCC Rcd 1952, 1953 ¶¶ 7, 11 (1991) (where applicant has a continuing and extensive record of civic activities, many of which are in leadership positions, applicant is entitled to a "significant enhancement credit"). See Davis Conclusion ¶ 82-83.

38. The other applicants also fail to credit Davis for future residency. Davis

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and opening of a senior-citizens housing complex in Columbus, and was involved in the decision-making process for numerous other Church civic activities serving the local Columbus community. Id.

<sup>21</sup> Ms. Davis has been a member of the Columbus Speech and Hearing Board from 1991 to the present. Davis Finding ¶ 35. The Columbus Speech and Hearing Board directs the operations of the Columbus Speech and Hearing Center, which is an organization in Columbus which helps improve the quality of life for speech and hearing-impaired people. Id. Ms. Davis is on the Board of Directors of the Center, in which capacity she attends meetings, assists with the fundraising activities for the Center, works on the Program Committee, and is a past member of the Finance Committee. Id. On the Program Committee she helps implement marketing actions to promote the activities of the Speech and Hearing Center to members of the overall public. Id.

<sup>22</sup> Ms. Davis was a Center for New Directions Panelist in 1991 where she was a speaker to women who want to start their own businesses. Davis Finding ¶ 35.

<sup>23</sup> In the Columbus Chapter of Links, Inc. she has been a chairperson of the organization's vocational education and career options module. Davis Finding ¶ 35. She is on the Advisory Committee of the United Way program called Project Diversity. Davis Finding ¶ 35. She has been on the Board of Directors of the Columbus Speech and Center Board. Davis Finding ¶ 35. She has been a member of the New Salem Baptist Church Business Development Board.

has pledged to continue to reside in or adjacent to Westerville in the event her application is granted. Davis is entitled to an additional slight preference under this factor. Newton Television, Ltd., 3 FCC Rcd 553, 555, ¶ 8 (Rev. Bd. 1988) (applicant whose integrated principals have resided in the area in the past and who unequivocally state that they will establish their residencies in the city of license in the future is entitled to credit for past residency and "the minor additional enhancement of the basic 'integration' credit that attends such a future commitment"), rev. granted in part, 4 FCC Rcd 2561 (1989), recon. denied, 5 FCC Rcd 2755 (1990). Davis Conclusion ¶ 84.

39. Finally, the competing applicants all fail to apply proper Commission principles to their analysis of Davis' minority heritage. As the Commission has stated:

minority ownership is entitled to substantial credit in enhancing an applicant's integration proposal. As the Commission, the courts, and the Commission have recognized, there is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership, which are at the heart of the Communications Act and the First Amendment...We assign "high importance" to fostering the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations," and we have consistently granted substantial credit for integration of minority ownership in comparative proceedings.

Waters Broadcasting Corp., 91 F.C.C.2d 1260, 1264 (1982), aff'd, sub nom., West

Virginia Broadcasting Co. v. FCC, 735 F.2d 601, 608 (D.C. Cir. 1984), cert.

denied, 105 S. Ct. 1392 (1985) (footnotes omitted) (emphasis added). Davis therefore

is entitled to a substantial enhancement under this factor. Davis Conclusion ¶ 85.

40. Finally, no precedent is cited to support ORA's proposition that Davis is entitled to only reduced credit for her auxiliary power proposal. ORA Conclusion ¶ 89. Thus, it should be rejected.

#### **DAVID A. RINGER**

41. There are three basic errors contained in Ringer's proposed findings and conclusions with regard to Ringer's own proposal.

42. First, Ringer claims that it is entitled to credit for past residency (Ringer Conclusion at ¶ 52), and fails utterly to provide citation to record evidence concerning his total lack of pre-cut-off-date residency. As reflected in Davis Exh. 5, all of Ringer's past residences for which credit was even attempted at various times were located outside of Ringer's proposed 1 mV/m contour. The distance to Ringer's 1 mV/m contour in the direction of Ringer's prior residence at 600 E. Town Street is 31.8 kilometers, but that residence was located 32.8 kilometers from Ringer's proposed transmitter site. Davis Exh. 5 at 1. Thus, the residence was located 1.0 kilometers outside Ringer's proposed 1 mV/m contour. The distance to Ringer's 1 mV/m contour in the direction of Ringer's prior residence at 1000 Urlin Avenue is 32.4 kilometers, but that residence was located 33.8 kilometers from Ringer's proposed transmitter site. Davis Exh. 5 at 1. Thus, the residence was located 1.4 kilometers outside Ringer's proposed 1 mV/m contour. Ringer's counsel conceded that both residences were located outside the proposed 1 mV/m contour of Ringer's proposed station. TR 276-77. Since his last remaining residence was established

after the cut-off date in this proceeding for comparative upgrades, in actuality, no credit is warranted. "Few principles are more firmly fixed in our case law than that which holds that an applicant may not seek to improve or upgrade its comparative posture after the 'B' cut-off date for amendments as of right." Mountain Media, Inc., 101 F.C.C.2d 787, 788 ¶ 3 (Rev. Bd. 1985). To the extent Ringer has not claimed an entitlement in his Conclusions to credit for his proposed future local residency, that credit should now be deemed waived by Ringer.

43. Similarly, although Ringer claims credit for past civic involvement (Ringer Conclusion ¶ 52), no credit is warranted for civic activities. During cross-examination, Ringer conceded that some of these activities occurred outside what he then believed were the limits of his proposed 1 mV/m contour (TR 144), that he "can't remember where all of those activities took place" (TR 166), and that "[i]f these things were done within [his] home, then they would have been within the one millivolt [contour]." TR 145. As noted above, it was subsequently conceded by Ringer's counsel during the hearing that Ringer's past residences from such times he participated in such activities, in fact, were both outside his station's proposed 1 mV/m contour. TR 276-77. See also Davis Exh. 5. Thus, a clear inference exists that the activities occurred outside his proposed 1 mV/m contour, the burden was upon him to establish through clear evidence or testimony otherwise (Anchor Broadcasting, 5 FCC Rcd 2432, 2435 (Rev. Bd. 1990), modified on other grounds and remanded, 8 FCC Rcd 4520 (1993)), and credit for past civic involvement is not warranted for activities occurring outside an applicant's proposed 1 mV/m contour.

Radio Jonesboro, Inc., 96 F.C.C.2d 1106, 1109 ¶ 5 (Rev. Bd. 1984), aff'd, 100 F.C.C.2d 941 (1985). Ringer is entitled to no credit under this factor.

44. Finally, contrary to Ringer's Conclusions (Ringer Conclusion ¶ 52), Ringer is not entitled to credit for his auxiliary power proposal. The record clearly shows the proposal was never even a part of his budget proposal. TR 145. As the Review Board recently noted in Linda U. Kulisky, 8 FCC Rcd 6235 (Rev. Bd. 1993), Commission precedent dictates that no credit for auxiliary power is warranted where auxiliary power generating equipment is not budgeted prior to designation of an application for hearing. Id. at 6238 n.1, citing, Athens Broadcasting Co., 17 F.C.C.2d 452, 461-62 (Rev. Bd. 1969). Therefore, Ringer is entitled to no credit for his auxiliary power proposal.

#### **ASF BROADCASTING CORPORATION**

45. ASF claims that it should receive credit for past local area residency despite the fact that its principal, Ardeth Frizzell, has never lived within the 1 mV/m contour of ASF's proposed station. ASF Conclusion ¶ 72. Under Commission precedent, applicants whose principals live even "just outside" its proposed service contour are denied qualitative enhancements for past area residency. Armando Garcia, 3 FCC Rcd 1065 (Rev. Bd. 1988), rev. denied, 3 FCC Rcd 4767 (1988). It is not proper for the Presiding Judge to extend Commission policy without clear instruction. Georgia Public Telecommunications Commission, 7 FCC Rcd 7996, 7997 (1992). Thus, ASF's proposed conclusion in this regard must be rejected.

46. ASF also claims credit for past participation in civic activities. ASF

Conclusion ¶ 72. This claim for entitlement also is misplaced. Here, no detailed information has been provided to establishment her entitlement to enhancement credit under this factor. All that the Commission has been told by ASF is that Ms. Frizzell "participated" in drives to collect shoes and "helped" to raise funds for two charitable causes. No information concerning the nature of that "participation" or "help" has been provided, the number of hours that were spent on the activity, or whether the "help" and "participation" was to assist organizations that were even within the 1 mV/m contour of the proposed station. Davis Finding ¶ 15. ASF has not submitted evidence concerning the extent to which the "activities" exposed or expanded its principal's knowledge of the needs and interests of Westerville (or even the station's proposed service area). See generally, ASF Exhibit 3 at 2. Where, as here, an applicant's principal's residency was outside the station's proposed 1 mV/m contour and its principal's civic activities were minimal in nature, no enhancement credit is warranted. Santee Cooper Broadcasting Co. of Hilton Head, Inc., 99 F.C.C.2d 781, 799 ¶ 22 (Rev. Bd. 1984). Ms. Frizzell's activities consisted exclusively of fundraising activities which were transient in nature, and thus, at best, are deserving of minimal credit. Rebecca Boedker, 6 FCC Rcd 2557, 2558 (1991). ASF therefore should not receive credit for its principal's alleged "civic activities." Beach Broadcasting Limited Partnership Ltd., 6 FCC Rcd 885, 886 ¶ 8 (Rev. Bd. 1991), rev. denied, modified in part, 6 FCC Rcd 4485 (1991).

47. Thus, in sum, ASF receives no enhancement credit under the area residency/civic activity component of the standard comparative issue.

48. Finally, in contrast to ASF's claims to the contrary (ASF Conclusion ¶ 76), ASF is not entitled to credit for auxiliary power. As the Review Board recently noted in Linda U. Kulisky, 8 FCC Rcd 6235 (Rev. Bd. 1993), Commission precedent dictates that no credit for auxiliary power is warranted where auxiliary power generating equipment is not budgeted prior to designation of an application for hearing. Id. at 6238 n.1, citing, Athens Broadcasting Co., 17 F.C.C.2d 452, 461-62 (Rev. Bd. 1969). Therefore, ASF is entitled to no credit for its auxiliary power proposal.

#### **OHIO RADIO ASSOCIATES**

49. The only basis for ORA's claim that it should prevail in this proceeding is that the Commission's integration policy is "irrational and contrary to the public interest" (ORA Conclusion ¶ 94), and that its engineering proposal is "superior." ORA Conclusion ¶¶ 95-97. Both of these claims attack established Commission policy. The Presiding Judge is not authorized to extend Commission policy without clear instruction. Georgia Public Telecommunications Commission, 7 FCC Rcd 7996, 7997 (1992). Thus, ORA's proposed conclusion in this regard must be rejected.

#### **WILBURN INDUSTRIES, INC.**

50. WII claims credit for future residency. WII Conclusions at 11. WII is incorrect. WII's proposed integrated principal has not yet commenced residency in the proposed 1 mV/m contour of his station. As the Commission recently stated:

little or no credit beyond basic "quantitative" credit for proposing full-time integration of a principal is to be awarded

merely on the strength of representations that he intends to commence local residence in the event his application is granted.

Gloria Bell Byrd, FCC 93-460 ¶ 22 (Oct. 1, 1993). Therefore, WII is entitled to a "little or no credit" for his pledge.

### **COMPARATIVE COVERAGE**

51. WII and Ringer improperly fail totally to address comparative coverage in their proposed findings and conclusions. Both the MMB and ORA improperly claim that ORA would be entitled to preferences over other applicants for service to underserved areas. ORA Conclusion ¶ 57; MMB Conclusion ¶ 2.

52. ORA will provide new fourth nighttime service to 183 persons and new fifth nighttime service to 2251 persons more persons than the other applicants. The only case cited in support of the proposition that the MMB cites in cite of the proposition that preferences are warranted for such new service is Northern Sun Corp., 100 F.C.C.2d 889, 894 (Rev. Bd. 1985), which involved new second and third nighttime service. If the service being provided was full-time, rather than nighttime service, a "very slight" preference would have been warranted. WFSP, Inc., 56 R.R.2d 1449, 1450 (Rev. Bd. 1984) (very sight preference given for new 4th service to 576 people and new 5th service to 1,683 people); Houston Family TV, Ltd., 101 F.C.C.2d 676, 705 ¶ 107 (ALJ 1984) (very slight preference to new 4th and 5th service to 8,256 persons), aff'd, 101 F.C.C.2d 661, 674 ¶ 23 (Rev. Bd. 1985). In contrast, as here, where the underserved nighttime service involves only nighttime service, no preference is warranted. Pleasant Hope Broadcasting, Inc., 6 FCC Rcd 1785, 1792 (ALJ Luton 1991) (difference in nighttime service to



underserved areas and populations of only 4510 persons deemed de minimis); Eugene Walton, 6 FCC Rcd 1288, 1303 ¶ 142 (ALJ Gonzalez) (new fifth nighttime service to 2010 more persons deemed too insignificant to merit awarding a comparative preference).

53. Therefore, the only credit that should be awarded in this proceeding for comparative coverage is a slight preference to Davis, Ringer, ASF, and ORA over WII for superior overall coverage. Davis Conclusion ¶¶ 96, 99.

### **CONCLUSION**

54. Shellee F. Davis is the clear preferred applicant in this proceeding. She has past connections and has evidenced a dedication and commitment to serving the community, is an experienced businesswoman with a proven ability to establish and nurture a successful new business from the ground up. This, in and of itself, establishes a desirable basis for awarding the permit to Davis. Moreover, she will bring to the Columbus airwaves her unique background which has developed through her minority heritage, her long-term local and area residency, and her past civic involvement. Additionally, her technical proposal is unsurpassed in this proceeding, and significantly, not only will she restoring the service previously provided by WBBY-FM, by virtue of her enhanced, directional 6 kW engineering proposal, she will bring improved service through new service to over 50% more persons, which represents the most efficient use of the currently nascent frequency.<sup>24</sup>

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<sup>24</sup> WII is proposing only to replicate WBBY's previous service. Davis will provide 55.67% more service than WII.

55. Accordingly, the application of Shellee F. Davis should be granted, and the applications filed by all other applicants should be denied.

WHEREFORE, it is respectfully requested that the Presiding Judge adopt the "Proposed Findings of Fact and Conclusions of Law" of Shellee F. Davis, and the propose findings of fact and conclusions of law submitted by Ohio Radio Associates, ASF Broadcasting Corporation, David A. Ringer, and Wilburn Industries, Inc., be rejected.

Respectfully requested,

SHELLEE F. DAVIS

By:

  
Dan J. Alpert

Her Attorney

1250 Connecticut Ave.  
7th Floor  
Washington, DC 20036  
(202) 637-9158

November 4, 1993

**CERTIFICATE OF SERVICE**

I, Dan J. Alpert, hereby certify that foregoing document was served on November 4, 1993 upon the following parties by First Class Mail, postage prepaid, or by Hand:

Hon. Walter C. Miller  
Administrative Law Judge  
2000 L Street, NW  
Washington, DC 20554

James Shook, Esq.  
Hearing Branch  
Federal Communications Commission  
Room 7212  
2025 M Street, NW  
Washington, DC 20554

Arthur V. Belendiuk, Esq.  
Smithwick & Belendiuk, P.C.  
1990 M Street, NW  
Suite 510  
Washington, DC 20036

James F. Koerner, Esq.  
Baraff, Koerner, Olender & Hochberg, P.C.  
5335 Wisconsin Ave, NW  
Suite 300  
Washington, DC 20015-2003

Stephen T. Yelverton, Esq.  
McNair & Sanford  
1155 15th St., NW  
Suite 400  
Washington, DC 20005

Eric S. Kravetz, Esq.  
Brown, Nietert & Kaufman, Chtd.  
1920 N Street, NW  
Suite 660  
Washington, DC 20036



Dan J. Alpert